

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:   
SOKOLOW, et al, : 04-CV-397 (GBD)  
:   
Plaintiffs, : February 10, 2014  
:   
v. : 500 Pearl Street  
: New York, New York  
PALESTINE LIBERATION ORGANIZATION, et al, :  
:   
Defendants. :  
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TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY DISPUTES  
BEFORE THE HONORABLE RONALD L. ELLIS  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE COURT: Good morning. This is Judge Ellis. Can  
2 I have your appearances?

3 MR. YALOWITZ: Good morning, Your Honor. Kent  
4 Yalowitz, Carmella Romeo, Tal Machnes, Arnold Porter on behalf  
5 of the plaintiffs.

6 MS. FERGUSON: Good morning, Your Honor. Laura  
7 Ferguson, Mark Roshan and Brian Hill on behalf of the  
8 defendants, the Palestinian Authority and PLO.

9 THE COURT: This is a conference in Sokolow v.  
10 Palestine Liberation Organization, et al., 04-CV-397. It is  
11 Monday, February 10<sup>th</sup> at approximately ten a.m.

12 I understand from my law clerk that the parties have  
13 been busy writing letters and let me just say two things  
14 because it seems the parties may have some misunderstandings.

15 One, with respect to the way the briefing and -- has  
16 been set these are all in accord with Judge Daniels' desires  
17 of what he wants in terms of motions. I know that in a number  
18 of times the parties have gone to Judge Daniels and given him  
19 the impression that you're not leaving me when I say this is  
20 what he wants. So believe me when I say when Judge Daniels  
21 wants to have one briefing schedule, he wants to have one  
22 briefing schedule. You can't change that by in treaties to me  
23 or going to him. What happens with different district judges  
24 in different cases that's up to the district judge but if it  
25 has to do with dispositive motions it's up to the district

1 judge how they want to handle it.

2           Secondly, with respect to the question of the trial,  
3 again the trial is obviously something which impacts on Judge  
4 Daniels' calendar but in consultation with him I have conveyed  
5 to him that the motions that he will be receiving could have  
6 some impact on the length and issues at the trial. His  
7 response is that to the extent that there's a request for a  
8 firm trial date he will not set a trial date until he has  
9 decided the motion and until he knows the extent of the  
10 commitment for trial.

11           I understand from the final joint proposed pretrial  
12 order that the plaintiff's estimate alone is for 50 trial days  
13 and that -- and I'm assuming that's based on the plaintiff's  
14 belief that the defendant's motions in limine won't be  
15 successful but assuming that it goes forward as it is 50 trial  
16 days for the plaintiff and an unspecified number of trial days  
17 for the defendant as you are aware the district judges you  
18 have to fit their civil docket in with their criminal docket  
19 and in order to make an informed decision as to how he's going  
20 to set this case down and for an extended period of time the  
21 judge has to know what period of time that's going to be.

22           So moving on from the question of a firm trial  
23 date --

24           MR. YALOWITZ: Your Honor --

25           THE COURT: Who's speaking?

1 MR. YALOWITZ: I apologize for interrupting. This is  
2 Kent Yalowitz on behalf of the plaintiffs. I certainly don't  
3 want to rearguing on what Your Honor just said. Just one  
4 point of clarification which is from the plaintiff's  
5 perspective I don't think this would change Judge Daniels'  
6 views but just to be clear, our 50 days was our best good  
7 faith estimate of what both parties would need to get their  
8 evidence in.

9 THE COURT: Okay. All right. Well, I --

10 MR. YALOWITZ: I don't think it impacts anything Your  
11 Honor said but I just wanted to make that clear.

12 THE COURT: Thanks for the clarification and I --  
13 you're right on both. First making the clarification and  
14 secondly as to whether or not I believe it would have any  
15 impact on Judge Daniels' modus of operating.

16 So let me -- there are three other issues -- I'm  
17 going to mention them just so that if there's something I'm  
18 missing that you will let me know before I go into what my  
19 thinking is on them.

20 First, there is the question of sanctions to  
21 defendants for the DIS documents. Second, there's the  
22 defendant's motion for reconsideration on the motion to  
23 dismiss, and third is the defendant's request for modification  
24 on the briefing schedule. Is there some other topic that the  
25 parties believe should be on the table?

1 MR. YALOWITZ: Your Honor, Kent Yalowitz again. I  
2 have one off agenda item which we just need some guidance from  
3 the court as to how to raise it but it hasn't -- it hasn't  
4 been presented to the court yet and so I just want to describe  
5 that at an appropriate time.

6 THE COURT: All right. I'll make a note to not end  
7 the conference before I hear that put on the table.

8 MS. FERGUSON: Your Honor, we don't have any other  
9 items for the call.

10 THE COURT: Okay. Thank you. Let me address the  
11 plaintiff's request on the motion for sanctions. First of  
12 all, I understand that the plaintiffs suggested a briefing  
13 schedule. I don't think that that's a workable solution but I  
14 did have some questions for the defendants. It seemed that  
15 the renewed search -- why was there a need for a renewed  
16 search because I thought that -- usually it's my idea that  
17 when parties put documents at issue they're talking about  
18 documents that they know about. So what did -- what does the  
19 term renewed search mean?

20 MR. HILL: Yes, Your Honor. This is Brian Hill.  
21 I'll address that. So just to remind you of the sort of  
22 history here. The initial discovery requests for GSI files  
23 pertaining to individuals was served on November 21, 2012  
24 which happened to be the last day for doing so. We conducted  
25 a search for materials in November and December of 2012 and

1 prepared a privilege log of the materials we found at that  
2 time. That privilege log sat for a number of months and then  
3 eventually in May of 2013 the plaintiffs filed a motion to  
4 compel. There was a lot of briefing back and forth on that as  
5 you know. We made a production that was redacted and at that  
6 time the plaintiffs raised the issue of documents that we  
7 produced in redacted form referring to what appeared to be  
8 other documents.

9           So we went back at that time and did a second search  
10 and found additional material and then when you eventually  
11 ordered a production of material in November we produced both  
12 the stuff we had found in November and December of 2012 and  
13 the material that we had found in August of 2013. Then in  
14 December right before Christmas of 2013 we got a letter with a  
15 list of additional materials the plaintiffs thought were  
16 referred to and the material that had been produced. As it  
17 turned out ten of those 64 items the plaintiffs already had.  
18 We then did a third search of GIS and located an additional 22  
19 items and determined that many of the remaining items  
20 apparently were not documents at all but oral reports.

21           In terms of how we got here, Your Honor, I can only  
22 say that this is a client that's not used to American style  
23 civil discovery. We did what we believed to be reasonable  
24 searches on all three occasions and we have tendered an  
25 affidavit from the person at GIS who was overseeing the

1 searches who has affirmed that the plaintiffs now have  
2 everything. I believe that to be true. Part of the  
3 difficulty here was that the materials that the plaintiffs  
4 have asked for are cumulative of other materials. They're not  
5 always filed in the same place. Some of them are, for  
6 example, non substantive internal correspondence that were not  
7 with the individual files but had to be separately located in  
8 different filing systems but we're comfortable that we've now  
9 done all that we can reasonably do to produce the materials  
10 that have been requested.

11 Not that this matters I guess for the present  
12 inquiry but just to remind the court, these materials are of  
13 marginal relevance at best and in our view are going to be  
14 inadmissible because they're just after the fact hearsay.

15 But, in any event, that's where we are at this  
16 point, Your Honor. We don't think there's any basis for  
17 sanctions and we believe the plaintiffs have now got all of  
18 the stuff that the client has.

19 THE COURT: And when you say that there were -- there  
20 are 32 documents that could not be located despite the renewed  
21 search, are you referring to old documents or is that  
22 something else?

23 MR. HILL: Well, we think they're mostly old  
24 documents, Your Honor, but it's a little hard to tell. The  
25 documents themselves reference reports. It's our

1 understanding, and the declaration confirms this, that many of  
2 these reports were oral. So we're in a little bit of a black  
3 box there but the client's understanding is that the missing  
4 material is for the most part oral reports or if there were  
5 documents they're cumulative of what the plaintiffs already  
6 have.

7 THE COURT: Okay. And who performed the search?

8 MR. HILL: Your Honor, Mr. Yaman who's the director  
9 of operations at GIS who's the declarant oversaw the search on  
10 behalf of GIS and instructed his subordinates both of the  
11 Ramala headquarters and at the relevant regional offices to  
12 perform the searches.

13 THE COURT: All right. As to this issue, I'm going  
14 to review everything that's been submitted. If I need  
15 additional information as to whether or not it's appropriate  
16 to -- again, understand that some of the things that the  
17 plaintiffs want really I'd have to recommend them to Judge  
18 Daniels because they have to do with evidentiary findings and  
19 jury instructions and inclusion of defenses which obviously  
20 could have some profound dispositive results. I will be  
21 discussing that with him after I've reviewed everything and  
22 make a determination as to whether I want any additional  
23 information but I don't think briefing is going to be the  
24 issue.

25 I understand that the plaintiffs have pointed out



1 deficiencies in the defendant's production and I've already  
2 indicated that it was my belief that defendants had not  
3 complied in a timely manner with the court's order. As to  
4 what's going to be an appropriate remedy for that I think as I  
5 said to the extent that it involves how Judge Daniels conducts  
6 his trial I will have to have further conversations with him.

7 As to --

8 MR. HILL: Thank you, Your Honor.

9 THE COURT: As to defendant's motion for  
10 reconsideration, while it is true that Judge Daniels has been  
11 referring significant parts of the pretrial to me obviously  
12 the motion for reconsideration involves a dispositive order  
13 and therefore -- maybe the defendants can refresh my  
14 recollection. This was an order by Judge Daniels, wasn't it?

15 MS. FERGUSON: Correct, Your Honor. It was  
16 [inaudible] order.

17 THE COURT: Right. And since -- I think in some  
18 respects given the way things have gone I can't fault you for  
19 bringing it to me in the first instance. However, as you  
20 might imagine part of the problem with a motion for  
21 reconsideration is that you have to know what it is that the  
22 judge considered and what the judge considered material in its  
23 consideration. Notwithstanding that you're talking about a  
24 Supreme Court decision I think in the first instance the  
25 person who can determine whether or not there is new matter

1 legally or factually is the judge who made the determination.  
2 Even if I were to read his opinion I think -- as I said, this  
3 does not rule out the possibility that it may be referred to  
4 me but in the initial instance it is something that in my  
5 judgment should be referred to Judge Daniels as a dispositive  
6 [inaudible].

7 MS. FERGUSON: Yes, Your Honor. We intended that  
8 Judge Daniels would consider the motion for reconsideration  
9 because it relates to an earlier order that he issued but that  
10 was our understanding as well.

11 THE COURT: Okay. Now, let me get to the issue --

12 MR. YALOWITZ: Your Honor, I apologize for  
13 interrupting. Just on this --

14 THE COURT: Speak your name whenever you speak  
15 though.

16 MR. YALOWITZ: Yes, sir. This is Kent Yalowitz  
17 again. On this motion for reconsideration I'm afraid that all  
18 of the flurry of letters back and forth has buried the issue  
19 that we brought to Your Honor's attention which simply was  
20 that we wanted to coordinate the briefing on personal  
21 jurisdiction with the briefing on the merits which requires  
22 the setting of a schedule that's slightly longer than the  
23 default schedule on the motion and that was really the purpose  
24 of my letter to Your Honor of February 3<sup>rd</sup> was just that right  
25 now I think the opposition is due next week and we would like

1 until the 28<sup>th</sup> of February to file our opposition and a cross  
2 motion on this issue and then we would propose that the  
3 defendants respond on the schedule of the summary judgment  
4 motion. So we weren't thinking that Your Honor would  
5 either -- we had no view on whether Your Honor would report or  
6 recommend or Judge Daniels would consider the motion in the  
7 first instance. Our view was simply that we wanted a schedule  
8 for it.

9 MS. FERGUSON: Your Honor, Laura Ferguson. Our view  
10 is that the Damler [Ph.] case is a significant case  
11 development and that it makes no sense to embark on a massive  
12 pretrial briefing effort until Judge Daniels has a chance to  
13 assess the motion for reconsideration and we will be before  
14 Judge Daniels on March 4<sup>th</sup>.

15 THE COURT: Okay.

16 MR. YALOWITZ: Just on that point, Your Honor. We  
17 did note that this particular motion for reconsideration is  
18 the seventh time that the defendants have asked the court to  
19 stay -- to dismiss the case and that the last time Judge  
20 Daniels denied a motion like that he told them not to file any  
21 more motions without engaging in a pretrial conference with  
22 Your Honor. So they may believe in their hearts that they're  
23 going to win the case now that they've filed their seventh  
24 motion to dismiss but I think just as a matter of order and  
25 fairness to us to sort of spring it in the midst of this and

1 say stop the whole train change everything that you're doing  
2 seems to use to be really unfair and inappropriate.

3 THE COURT: Well --

4 MR. YALOWITZ: I think Your Honor has the picture.

5 THE COURT: Let me point out to the parties again  
6 Judge Daniels has very definite ideas about how this should  
7 happen. I think in this instance I don't think that there's  
8 going to be any putting off of motions even if the defendants  
9 feel confident.

10 What I can do for you is I can offer you relief in  
11 scheduling. I can offer you relief in how you present the  
12 motions but if you're going to present any motions to Judge  
13 Daniels, whether they be motions in limine, motions for  
14 summary judgment, motions for reconsideration his idea is to  
15 consider it altogether.

16 So I am -- I under -- and in that regard the  
17 plaintiff's suggestion about putting the briefing schedules in  
18 a way that the parties are responding to the multiple  
19 submissions at the same time I think would be consistent with  
20 the way Judge Daniels wants to do this as opposed to any kind  
21 of piecemeal or any kind of other separate motions. So no  
22 bifurcating. No decide this motion first. Even if you divide  
23 the motions into separate motions they will all be due at the  
24 same time.

25 MS. FERGUSON: Your Honor, this is Laura Ferguson.

1 Then we do need some scheduling relief for the reasons we  
2 stated in our January 27 letter. The January 22<sup>nd</sup> proposed  
3 joint pretrial order identified some 870 exhibits from  
4 plaintiffs, about half of which are not in English. We don't  
5 have plaintiff's translations. Numerous new witnesses were  
6 identified. Many of the documents on exhibit lists weren't  
7 produced during the discovery period. So it's a major  
8 undertaking to deal with all of these documents and motions in  
9 limine and the motions for summary judgment.

10 So we would ask to have until March 28<sup>th</sup> to do the  
11 filings of the Daubert motions, the motions in limine and  
12 motions for summary judgment.

13 THE COURT: And --

14 MR. YALOWITZ: Your Honor, would you wish to hear  
15 from plaintiffs on this?

16 THE COURT: Yes. Everybody gets their say so they're  
17 on the record.

18 MR. YALOWITZ: Thank you, Your Honor. With regard to  
19 the timing the defendants have been planning to file summary  
20 judgment since November 1<sup>st</sup>. We've heard on many, many  
21 occasions from the defendants, the court has heard that there  
22 are going to be a lot of documents and a lot of witnesses.  
23 They certainly knew that. They brought that to the court's  
24 attention. As plaintiffs we've had a very difficult time  
25 getting the case to this point. We feel that we've worked

1 hard. We know that the defendants have worked hard. If it's  
2 a matter of giving them an extra week as a reasonable  
3 professional courtesy we're -- I don't want to object to  
4 something that would be reasonable but really to go from  
5 November to March without filing our summary judgment and in  
6 limine motions seems to be quite [inaudible].

7 I would say that we heard that they couldn't  
8 possibly get the joint pretrial order done by January 22 and  
9 that there was going to be just a complete train wreck for  
10 them and they wound up -- I must compliment them. They were  
11 extremely organized. They did a very effective and efficient  
12 job and they wound up with something like 69 trial exhibits  
13 and seemed to be able to comply with the court's schedule  
14 without any trouble. So I think March 28<sup>th</sup> is really quite too  
15 far.

16 MS. FERGUSON: May I respond, Your Honor?

17 THE COURT: Proceed. Go ahead.

18 MS. FERGUSON: Yes. So it's one thing in theory to  
19 understand that the case involves a lot of documents. It's  
20 another to actually have the plaintiffs identify their  
21 exhibits. So we didn't have the exhibit list until January  
22 22<sup>nd</sup> and as I said it's around 870 exhibits. Plaintiff did not  
23 produce copies of the exhibits. We offered to exchange  
24 copies. They chose not to do so. They declined to produce  
25 translations of the exhibits. So it's a major undertaking to

1 categorize these exhibits, locate them, to get them  
2 translated, to prepare the motions in limine, and the summary  
3 judgment motion has to be coordinated with the motions in  
4 limine.

5           So the notion that we could have been preparing this  
6 months before we got their exhibit list is simply not true.

7           MR. YALOWITZ: Your Honor, I apologize for the back  
8 and forth but just one point on this. I believe that the  
9 defendants have all of the exhibits on the list. Part of the  
10 reason I believe that is because most of them either were  
11 formally produced in discovery or were informally provided to  
12 the defendants as part of the expert witness discovery that we  
13 had in 2013 and I didn't get any requests from the defendants  
14 or copies of any of the documents that they were having  
15 trouble finding and indeed they filed an objection list with  
16 very specific objections about every single document. So they  
17 must have had them by early January or they wouldn't have been  
18 able to prepare that list.

19           MS. FERGUSON: This is Laura Ferguson.

20           THE COURT: Counsel, I understand your arguments. So  
21 you want relief on the date. Any other relief that you're  
22 looking for?

23           MS. FERGUSON: No, Your Honor.

24           THE COURT: Okay. The conference that you had with  
25 Judge Daniels, that's for the status conference?

1 MS. FERGUSON: Yes, Your Honor.

2 MR. YALOWITZ: It does appear that Judge Daniels  
3 scheduled that for just a few days after the motions were due.  
4 I assume that was purposeful on Judge Daniels part but we'll  
5 go by whatever schedule you and he provide.

6 THE COURT: Okay. All right. Just -- Ms.  
7 Ferguson --

8 MS. FERGUSON: Yes, Your Honor.

9 THE COURT: -- how many motions in limine are -- I  
10 mean how many components to the motion in limine? How many  
11 experts [inaudible] you're dealing with?

12 MS. FERGUSON: We have 14 experts and then there's  
13 numerous categories. I mean essentially plaintiffs  
14 [inaudible] kitchen sink [inaudible] to their exhibit list.  
15 So there's numerous categories of documents that we need to  
16 exclude.

17 THE COURT: So the motion in limine is about experts  
18 and about documents?

19 MS. FERGUSON: Right. They'll be one set of motions  
20 in limine to exclude experts and then another set to exclude  
21 various categories of documents.

22 THE COURT: I'll give you -- the odyssey will begin  
23 on March 21<sup>st</sup>. I want the parties to take the schedule that I  
24 had presented initially and give me a unified schedule with  
25 the other dates pushed back accordingly.



1 MS. FERGUSON: Your Honor, could we get an order that  
2 the plaintiffs produce translations for their exhibits?

3 MR. YALOWITZ: Your Honor, this is --

4 MS. FERGUSON: It's a real challenge for us because  
5 we don't have translations for any of the exhibits.

6 MR. YALOWITZ: Your Honor, I must say this is the  
7 first time I'm hearing from the defendants that this is a  
8 problem. We'd be glad to work with them on providing  
9 certified translations.

10 MR. ROSHAN: Your Honor, that's nonsense. We've  
11 told them the problems with the translations and the exhibits  
12 hadn't been given us immediately after they filed the joint  
13 PTO and during the JPTO process. This is Mark Roshan  
14 speaking.

15 THE COURT: Okay. Who --

16 MR. ROSHAN: So the notion --

17 THE COURT: I'm sorry. I'm sorry. Say your name  
18 again.

19 MR. ROSHAN: Roshan, Mark. The notion that this is  
20 the first time they've heard about it is nonsense. We've been  
21 talking about this since before the JPTO was filed. They  
22 filed hundreds of pages with no translations. We can't move  
23 to exclude that which we don't know the content of which is  
24 why we asked for March 28<sup>th</sup> because we're incurring the current  
25 expense to try to get them translated. That's why we need

1 until March 28<sup>th</sup>. If we're not going to get that relief we  
2 need the alternative relief of tell them to produce  
3 translations. This is a nonsense way to proceed because if  
4 they're exhibits they have to be in the English language  
5 because they've chosen to file suit in America.

6 THE COURT: Well, notwithstanding your approach to  
7 making the application to the court, which I think was a  
8 little bit over the top, I agree with the substance of what  
9 you say, that is to the extent that they were presenting  
10 exhibits, the exhibits should have been produced in English  
11 and the parties should have agreed to the production of them  
12 in English because I assume that you're going to run into some  
13 problems with Judge Daniels if that has not been agreed to.

14 Mr. Yalowitz has indicated that whether you agree  
15 with him or not that it had been brought up before. I'm  
16 directing the parties to get together and for the plaintiffs  
17 to make sure that the defendants have translations, certainly  
18 to the extent that the plaintiffs have translations.

19 We had an issue come up earlier concerning the  
20 production of translation. I trust that the parties will  
21 discuss this and if you have any disputes as to how you're  
22 going to arrange for the translation bring that to me as  
23 quickly as possible so that we can make sure that Judge --  
24 neither Judge Daniels or I need to make any adjustments.

25 So is there any question, Mr. Yalowitz, about what I

1 expect you to do?

2 MR. YALOWITZ: No. Your Honor, I think that's fine.

3 I just -- please don't assume from my silence that I agree  
4 with anything Mr. Roshan said but we would be happy to work  
5 with the defendants to get them our translations and I assume  
6 they're going to do their own translations to check up on us  
7 anyway. So we'll -- I don't think we're going to have a  
8 problem with the translation issue.

9 THE COURT: Well, for the benefit of both of you, I'm  
10 not making findings about who is making the correct  
11 representation and who is not. I will tell you that if it  
12 ever comes to it I will have you -- I will have attorneys if  
13 necessary sworn in front of me and we'll see who I find  
14 most -- more credible.

15 I also want to point out, Mr. Roshan, that calm  
16 detachment of legal argument works a lot better on me than --  
17 even if you are upset. So I don't know whether or not the  
18 plaintiffs have caused you to be upset or rightfully so but  
19 I'm only trying to deal with what will get this case ready for  
20 Judge Daniels and if you have the force of logic on your side  
21 it will win in the end. In this case I think the translations  
22 are appropriate.

23 MR. ROSHAN: Understood. Thank you.

24 THE COURT: Is there anything -- I think it was Mr.  
25 Yalowitz who said that there was something that you wanted to

1 discuss.

2 MR. YALOWITZ: Yes, Your Honor. So the topic that we  
3 need some guidance from the court on as to how to sort of  
4 present it for decision has to do with the use of documents  
5 that have been designated as confidential during discovery,  
6 the use and filing of those both on summary judgment which is  
7 coming up very soon, although not as quite as soon as it was  
8 earlier, and ultimately at trial.

9 The confidentiality order is quite broad. That's  
10 fine for discovery but as Your Honor knows once we move to  
11 summary judgment and trial the right of public access takes a  
12 front seat and a compelling need for privacy is required to  
13 overcome the right of public access.

14 We've raised the issue of confidentiality in part  
15 with Judge Daniels in connection with the filing of the joint  
16 pretrial order. We've presented that to Judge Daniels for his  
17 consideration, not only the joint pretrial order but this  
18 issue of certain statements in it that the defendants would  
19 like to keep out of the public domain and in addition to that  
20 there are 169 documents that the defendants contend merit  
21 confidential treatment at trial and on summary judgment and we  
22 need a mechanism for the court to test those claims.

23 I don't think they need to be done document by  
24 document. I think they can be done by category but it's  
25 important to the plaintiffs that justice be done in public

1 here and not in secret. So we're looking for some guidance  
2 from the court on whether we should present that issue by  
3 letter or by letter perhaps a conference and in addition  
4 should we present it to Your Honor in the first instance or to  
5 Judge Daniels.

6 THE COURT: Okay. Well, if I recall correctly the  
7 confidentiality agreement had a provision that if the parties  
8 were concerned about something being over designated  
9 confidential there was a mechanism to bring that to the  
10 court's attention. Because the parties didn't take advantage  
11 of that during the discovery process to the extent that you  
12 want to use it in your motion -- in fact, I think there was an  
13 ECF mechanism for that but -- are you -- I'm not sure. Are  
14 you saying that you don't want to submit them under seal or  
15 you want them to be unsealed by either Judge Daniels or  
16 myself?

17 MR. YALOWITZ: We don't want to submit them under  
18 seal. The court's -- the order's mechanism was for during  
19 discovery, Your Honor, and you're remembering correctly that  
20 the parties I think to the chagrin of Mr. Tolchin did not  
21 avail themselves of the de-designation process with Your  
22 Honor. The truth is that the confidentiality order itself was  
23 really extremely broad and I don't have an issue with the  
24 breadth of it for purposes of discovery and the order does say  
25 that the court will set a new mechanism for dealing with

1 hearings and trial.

2           So really we're sort of at the stage where the old  
3 mechanism is perhaps out of date and there's now -- we need  
4 some new rulings from the court on whether these things are  
5 going to remain under seal and we would prefer to have that  
6 ruling before summary judgment motions are due. I'm happy to  
7 use the mechanism in the order to present the issue to the  
8 court. I think we've reached impasse with the defendants on  
9 this. We have discussed it and exchanged letters. So I think  
10 we understand their position. I'm happy to present that to  
11 Your Honor. I just didn't want to do it in a gun jumping way.

12           THE COURT: Okay. Well, you -- as you recall, the  
13 position I took with Mr. Tolchin as to how these things ought  
14 to be raised and you're right that we're now in a different  
15 stage of the litigation. I think in the first instance while  
16 you may have a desire to have everything in the light of day  
17 during the motion process you may have to wait until the trial  
18 process which is before Judge Daniels. I don't want to -- at  
19 this point I'd be less than desirous of opening up to the  
20 parties the idea of now challenging those designations and  
21 opening up to a whole host of submissions from both sides as  
22 part of the discovery process.

23           Unless Judge Daniels thinks it's necessary to do  
24 this I would not embark upon that process because don't think  
25 there's a compelling reason to do it this late in the game.

1 MR. YALOWITZ: Your Honor, I apologize. I may not  
2 have -- I don't think I expressed clearly what I was trying to  
3 accomplish. I certainly don't want to go back and reopen all  
4 of the confidentiality designations of the parties during  
5 discovery. There are many, many things that people exchanged  
6 during discovery that they routinely designate as confidential  
7 and I think the courts and the parties understand that most of  
8 the -- the vast majority of things that are exchanged are  
9 confidential never become what the -- what you would call  
10 judicial documents. They never become important or germane to  
11 the judicial decision making process.

12 So I certainly don't want to revisit any of that but  
13 now that we've -- both sides have prepared the JPTO we know  
14 what exhibits the parties are planning to use for case  
15 dispositive, potentially case dispositive motions as well as a  
16 trial and the Second Circuit law on public access to those  
17 documents is that there's a presumption of public access. So  
18 it's not the whole vast array of documents that we need  
19 guidance on. It's the documents that the plaintiffs have  
20 indicated that we intend to use to oppose summary judgment and  
21 to present to the jury at trial and those documents I think do  
22 need to -- we do need a ruling from the court in connection  
23 with the summary judgment motion just because of the Second  
24 Circuit's standard on public access to summary judgment  
25 papers. So that's the guidance we're looking for.

1 THE COURT: Well, I understand your concern to public  
2 access. However, I think given how it's being raised to the  
3 extent that you believe that any subset of documents by  
4 description -- you're talking about classes of documents.

5 MR. YALOWITZ: Correct.

6 THE COURT: There's nothing to prevent you from  
7 making that application at the time that you finalize your  
8 submission to the court so that in the context of the motion  
9 the court can also make the determination as to whether or not  
10 documents are -- need to be kept confidential.

11 So certainly in the past I've had situations where  
12 parties have indicated that during the process of briefing or  
13 pretrial that certain documents which had been previously  
14 designated as confidential should no longer be confidential  
15 and in the context of trial the court would review them and  
16 determine that they in fact should not be kept confidential  
17 because they're going to be presented during the trial.

18 But as to -- I think your ultimate desire to do it  
19 separately so that either I or Judge Daniels would rule on a  
20 class of documents and say that they should not be  
21 confidential because they [inaudible] speaking or that at  
22 [inaudible] of confidential that people over designate during  
23 discovery. If you want to raise it as an issue I think it's  
24 certainly timely enough to raise it at the time that you're  
25 presenting the documents to the court so that there's not



1 duplication of effort.

2 MR. YALOWITZ: We'll proceed in that way, Your Honor.  
3 Thank you for guidance.

4 THE COURT: Okay. We'll be adjourned. Obviously I  
5 don't know whether this means that you're likely to still have  
6 the conference with Judge Daniels but you submit an order for  
7 me to sign which adjusts the dates. I assume you all can work  
8 on that together.

9 MS. FERGUSON: Yes, Your Honor.

10 THE COURT: All right. We'll be adjourned. Thank  
11 you.

12 MR. YALOWITZ: Thank you, Your Honor.

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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.

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6 Shari Riemer

7 Dated: February 12, 2014  
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